No. 22,084

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE W. PALMER,

Appellant,

vs.

LLOYD PATTERSON, et al,

Appellee,

PETITION FOR REHEARING

FILED
MAY 14 1968
WM. B. LUCK, CLERK

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Attorney for Appellant

PETITION FOR REHEARING

This petition is being filed in accordance with Rule 23 of this Court. It is respectfully suggested that the decision dated April 16, 1968 in this appeal be considered by this Court en banc. This suggestion is made pursuant to the fifth part of this Rule 23.

To understand why a request for a rehearing is being made in this case it is necessary to consider both the issues presented by the record and the reason for denying the relief sought by the appeal. The issues presented by the record concern what constitutes due process of law as required by the Fourteenth Amendment to the U.S. Constitution while the April 16, 1968 decision denied relief solely because the Appellant had not exhausted available state remedies.

The issue that the Appellant was denied due process of law was first presented to the California Tuolumne County Superior Court. By an order dated April 18, 1966, the Appellant was denied relief by the state court (R.16-18). Since the decision by this court in Schiers v. People of the State of California, 333 F2d 173 (9 Cir 1964) held that an issue of denial of constitutional rights only needed to be presented to a state court once before it could be presented to Federal

courts, and since it appeared that no relief could be obtained by further state proceedings the Appellant thereafter sought relief from the Federal courts.

This was done by petitioning for the Writ of Habeas Corpus in the lower court on the ground that Appellant had been denied the constitutional right of due process. In this lower court the Appellee did not even raise the issue of the exhaustion of state remedies, presumably because of the clarity of the <u>Schiers</u> decision, supra. In due course the lower court "was of the view that a substantial constitutional question was raised" by the petition, but denied the writ requested on the merits (R.118,119). The lower court then issued a certificate of probable cause so that this appeal could go forward (R. 123,124).

Thereafter the issue of exhaustion of state remedies was raised by the Appellee in its last section of argument in its brief. Here the Appellees did not even mention the <u>Schiers</u> case, supra, but cited two Federal cases, <u>Morehead v. State of California</u>, 339 F2d 170 (9 Cir 1964) and <u>Fay v. Noia</u>, (1963) 372 U.S. 391, 83 S.Ct. 822, 9 L Ed 2d 839. Nowhere have the Appellees attempted to discuss Schiers, supra. Apparently the attitude is that it doesn't exist.

But Schiers, supra, does exist. It has been cited in other circuits as authority for the power of Federal courts to decide constitutional issues where state remedies have not been exhausted. Note Shepard v. Maxwell, 346 F2d 732 (6 Cir 1965). Fay v. Noia, supra, indicates this power.

As it now stands, Schiers, supra, indicating that a denial of constitutional rights can be considered by Federal Courts after having been once presented to a state court appears to remain in effect. The Morehead v. State of California, supra, cited as authority cited in the April 16, 1968 per curiam decision in this appeal does not relate to the constitutional issues involved, but merely states a corollary of the Schiers' rule -- state courts must consider and deny a constitutional issue before such an issue will be considered by a Federal court. The Appellant did in fact obtain a denial of his constitutional claim by a state court. Under the circumstances, the decision in this case, relying on Morehead, supra, does not appear to change the interpretation of the law, but does in fact change it without clearly telling anyone.

In this day of changing views, prior decisions are often overruled. In so doing the courts should clearly indicate what they are doing so that decisions do not remain "on the books" which no longer represent the law. Hence, a

rehearing as to this appeal is necessary to avoid confusion as to others in the future.

George W. Palmer, Appellant

by:
Edward D. O'Brian
Attorney for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this Petition for Rehearing, I have examined Rules 18, 19, 23 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Petition for Rehearing is in full compliance with those rules, and that in my judgment this Petition for Rehearing is well-founded, and that this Petition for Rehearing is not interposed for purposes of delay.

Edward D. O'Brian
Attorney for Appellant

PROOF OF SERVICE

EDWARD D. O'BRIAN, Counsel for Appellant, GEORGE W. PALMER, in the above entitled matter hereby certifies that three (3) copies of the foregoing Petition for Rehearing were placed in the United States mail, with postage fully prepaid, addressed to JACK R. WINKLER, Deputy Attorney General, 500 Wells Fargo Bank Building, Fifth Street and Capitol Mall, Sacramento, Calif. 95814, on this thirteenth day of May, 1968.

Edward D. O'Brian
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEP 18 1968

No. 22087

MASARU SUMIDA, STANLEY UNTEN, CHARLEY T. SHIRAISHI, and WILLIAM S. ELLIS, JR., as General Partners, and FLORENCE A. ELLIS, aka FLORENCE LUMAHAI ELLIS, as former General Partner, in the General Partnership of OLINDA ASSOCIATES and the Limited Partnership of KULA GARDENS ASSOCIATES, and Not Individually,

Debtor-Appellants,

and

KULA DEVELOPMENT CORPORATION and RALPH E. COREY,

Creditor-Appellants,

vs.

FUSAO YUMEN, KIMIYO YUMEN, J-R-M CORPORATION, MYRA DEANE CHARLTON, and MOLOKAI PROPERTIES, INC.,

Creditor-Appellees,

and

FARMLAND, INC.,

Adverse Claimant-Appellee.

No. BK-67-17

United States
District Court
for the District
of Hawaii

The Honorable
Martin Pence,
Presiding.

ANSWERING BRIEF

and

CERTIFICATE OF SERVICE

FILED

SEP 18 1968

WM. B. LUCK CLERK

UEOKA & VAIL
Attorneys for Appellees
Fusao Yumen and Kimiyo Yumen.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22087

MASARU SUMIDA, et al., and KULA DEVELOPMENT CORPORATION, et al., Appellants, vs. FUSAO YUMEN, et al., Appellees.	No. BK-67-17 United States District Court for the District of Hawaii The Honorable Martin Pence, Presiding

ANSWERING BRIEF

I. JURISDICTION

1. District Court. Jurisdiction of the United States District Court for the State of Hawaii was based on Sec. 1(10) of the Bankruptcy Act, 11 U.S.C.A Sec. 1(10), which specifies that courts of bankruptcy shall include United States district courts, and Sec. 2(a)(9), 11 U.S.C.A. Sec. 11(a)(9), which grants bankruptcy courts the authority to "Confirm or reject arrangements or plans proposed under this title . . . ."

Appellants filed a petition for a real property arrangement on January 17, 1967, pursuant to Chapter XII of the Bankruptcy Act (R. 2-23). The filing of the petition

immediately placed petitioners under the jurisdiction of the U.S. District Court for the State of Hawaii, sitting as a bankruptcy court.

Appellees challenged Appellants' petition by submitting a motion to dismiss (R. 92-95) the petition on February 9, 1967, contending that, inter alia, Appellants' arrangement did not contain adequate means for its execution (R. 96-132). The filing of the motion to dismiss placed Appellees within the jurisdiction of the bankruptcy court which set February 17, 1967, as the date for the hearing on Appellees' motion to dismiss.

At the hearing, the District Court granted Appellees' motion to dismiss after finding that it could not confirm Appellants' arrangement because, inter alia, the arrangement was not feasible (R. 314). Hence, it entered written orders of its decision on April 17, 1967 (R. 232-235). These orders were subsequently superseded by the revised orders entered on May 17, 1967 (R. 312-314).

2. Court of Appeals. Jurisdiction of the United States Courts of appeals is based on Sec. 24(a) of the Bankruptcy Act, 11 U.S.C.A. Sec. 47 (a), which authorizes these courts to review interlocutory or final decrees in "proceedings in bankruptcy". Sec. 24 is pursuant to Sec. 416 which provides

that appellate review of Chapter XII proceedings shall be the same as in a bankruptcy proceeding where not inconsistent with the provisions of Chapter XII.

Appellate jurisdiction also seems proper in this case because Appellants appear to have complied with Sec. 25(a), 11 U.S.C.A. Sec. 48(a), which requires that an appeal must be taken "within thirty days" after the losing party receives written notice of the entry of the judgment. In the case at bar, the judgment was entered on April 17, 1967 (R. 235) and Appellants filed their notice of appeal on May 17, 1967 (R. 307).

There are, however, authorities limiting the scope of this appeal. In Mulford v. Fourth Street National Bank, (C.C.A. 3, 1907), 157 F. 897, 85 C.C.A. 225, 19 Am. Bankr. Rep. 742, the district court judge refused to confirm an arrangement between the bankrupt and certain of his creditors who received preferential transfers. The Third Circuit Court

of Appeals ruled that the decision of the lower court was discretionary and reviewable only for abuse. Numerous other authorities are cited in 11 U.S.C.A. Sec. 47, pp. 682-683, holding that the appellate court must deem conclusive the findings of a bankruptcy court on questions of fact where such findings are sustained by substantial evidence.

In the instant case, the orders appealed from deal with the decision of the lower court which denied Appellants' motion for a continuance of the February 17 hearing and granted Appellees' motion to dismiss the arrangement (Transcript, p. 50-52). This decision was based on the finding by the lower court, inter alia, that the arrangement was not feasible and could not be confirmed (R. 312-314).

Under Mulford v. Fourth Street National Bank, supra, the refusal to confirm the arrangement by the lower court is a factual issue falling within the discretionary authority of the court. Consequently, Appellees respectfully contend that the United States Court of Appeals for the Ninth Circuit are bound to review the decision of the lower court only on the basis of whether or not that court abused its discretion in refusing to confirm the Appellants' arrangement.

II. STATEMENT OF FACTS

Appellants filed a petition for a real property arrangement pursuant to Chapter XII, Bankruptcy Act, on January 17, 1967 (R. 2-23). They simultaneously filed a motion for extension of time to submit the necessary supporting papers of the arrangement (R. 24-29). Two additional motions for extensions of time were filed on January 26 and February 9, 1967 (R. 58-65; R. 71-74).

Meanwhile, on January 24, 1967, Appellants moved to stay the suits against them (Civil No. 11563 and Civil No. 12316) in the First Circuit Court of the State of Hawaii because of the petition in bankruptcy (R. 38-43). They also moved to stay or continue two other suits (Civil Nos. 586 and 817) in the Second Judicial Circuit on February 9, 1967 (R. 71-89).

After learning about Appellants' petition for a real property arrangement, Appellees Fusao and Kimiyo Yumen filed a motion to dismiss Appellants' petition on February 9, 1967 (R. 92-95). Appellees served the motion and a notice of the hearing on the motion to the counsel listed on the petition for arrangement, Mr. William S. Ellis, petitioner _pro se_, and Mr. Ralph E. Corey, Esq. (R. 2).

Appellees had no notice of the substitution of Mr. Harry T. Tamura as counsel for petitioners except William S. Ellis, Jr., which occurred on January 26, 1967 (R. 26-27). However, Mr. Tamura was served with the motion and notice of the hearing on February 13, 1967 (Opening Brief, p. 8).

In reply to Appellees' motion to dismiss, Appellants moved for a continuance of the hearing. Said motion was filed on February 14, 1967 (R. 142-143).

At the hearing on February 17, 1967, both the Appellants' motion to continue and Appellees' motion to dismiss were pending before the court (Transcript, p. 2). Upon finding that an automatic approval of Appellants' motion would result in substantial injury because Appellants' creditors have remained unpaid for several years (Transcript, p. 8), the court sought to obtain prima facie evidence as to whether or not Appellants' arrangement could be executed for the benefit of the creditors before granting the motion to continue (Transcript, pp. 12-13). After permitting Petitioner Ellis to testify extensively on the arrangement, the court found that the arrangement was not in the best interest of the creditors (Transcript, pp. 50-52). Consequently, the court denied Appellants' motion to continue and granted Appellees' motion to dismiss the arrangement (Transcript, p. 52).

Appellants sought a reconsideration of the decisions (R. 168-169), but the court affirmed its February 17 decisions at the April 26 hearing on the Motion to Reconsider.

The court entered its Orders Denying Motion for Continuance and Granting Motion to Dismiss on April 17, 1967 (R. 232-235), which was superseded on May 17, 1967, by the Amended Findings of Act and Conclusions of Law on Creditors' Motion to Dismiss and Debtors' Motion for Continuance (R. 312-314). On the same day, Appellants filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit (R. 315-317).

As to the questions to be considered on appeal, Appellees concur in the questions listed in Appellants' Opening Brief, Pages 15-16.

III. ARGUMENT

A. Summary

Appellees' argument is primarily guided by the contentions of the Appellants in their opening brief. Divided into five parts, the Appellees' argument shall prove:

1. The District Court had statutory authority to dismiss Appellants' petition for a real property arrangement.
2. The District Court properly exercised its authority to dismiss Appellants' petition.
3. Appellees, as creditors, had the right to challenge the propriety of Appellants' arrangement on jurisdictional grounds.
4. Appellants were afforded due process in that they were duly served with the motion to dismiss and with notice of the hearing and they were given full opportunity to be heard at the hearing.
5. The District Court did not abuse its discretion in denying Appellants' motion to continue the hearing since there were adequate grounds for dismissal of the petition, making a continuance totally unnecessary.

B. District Court has Authority to Adjudicate or to Dismiss a Chapter XII Petition

Section 18(f) of the Bankruptcy Act states that the filing of a voluntary petition under Chapters 1 to 7 of the Act, other than a petition filed in behalf of a partnership by less than all of the partners, operates as an adjudication. Consequently, by operation of law, a judge is prevented from hearing such a petition for the purpose of adjudicating or dismissing it.

The Appellants assert that "pursuant to Sec. 402 and Sec. 412(2) of the Act," Sec. 18(f) is also applicable to a Chapter XII petition, thereby depriving the District Court of any authority to dismiss its Petition for a Real Property Arrangement (Opening Brief, p. 23).

However, the Appellants overlook the fact that Sec. 402 and Sec. 412(2) incorporate the provisions of Chapter 1 to 7 only "insofar as they are not inconsistent or in conflict with the provisions of this chapter." (Sec. 402, Bankr. Act; 11 U.S.C.A. Sec. 802). Furthermore, they fail to observe that their attempt to apply Sec. 18(f) of the Act in the manner asserted in their brief would render impotent Sec. 481 of the Act, which expressly authorizes the

court to adjudicate or dismiss a Chapter XII petition under the circumstances specified therein.

The language of Sec. 481 states that a district court may dismiss a Chapter XII proceeding under certain circumstances, e.g., withdrawal or abandonment of the arrangement, where the interest of the creditors would be served. There is no language limiting the court solely to confirm or refuse to confirm the petition where the special circumstances described in Sec. 481 occur.

Even the authoritative source cited by the Appellants (Opening Brief, p. 23) states that under Sec. 412 only a "constructive adjudication for various purposes" occurs upon the filing of a Chapter XII petition "where not inconsistent with the provisions of Chapter XII". 9 Collier on Bankruptcy, 14th ed., sec. 3.02, p. 800. Emphasis added. Clearly, Collier does not hold that Sec. 412 automatically operates to effect a direct adjudication of bankruptcy under all circumstances upon the filing of a Sec. 422 petition as the Appellants contend in their brief.

In addition, there is case authority interpreting Sec. 481 as permitting a bankruptcy court to dismiss a petition for a real property arrangement. See Preas v. Kirkpatrick & Burks, et al, (C.A. 6, 1940), 1955 F.2d 802,

44 Am. Bankr. Rep. N.S. 503; In Re Potts, (C.A. 6, 1944), 142 F.2d 883, 56 Am. Bankr. Rep. N.S. 175, cert. denied, 324 U.S. 868, 65 S.Ct. 910; Meyer v. Rowen et al., (C.A. 10, 1952), 195 F.2d 263. Specifically on point, one court stated:

> "The jurisdiction to adjudicate or dismiss is vested in the court . . . . * * * * The statute empowers the court either to adjudicate or dismiss. The alternative to be adopted must be in the interest of the creditors. The interest of the debtor is ignored." In Re Potts, (C.A. 6, 1944), 142 F.2d 883, at 891.

C. District Court Properly Dismissed the Chapter XII Petition

The District Court dismissed the Appellants' petition for a real property arrangement because "it appears that the major creditors are opposed to the proposed arrangement" and because

> ". . . the debtors' proposal is so unfeasible, so entirely lacking in merit, is so unreasonable in the treatment of the creditors, and based on conditions so improbable of fulfillment, that this court could not approve and confirm debtors' plan even if adopted by the creditors. . . ." (R. 314).

The grounds for dismissal relied upon by the lower court are firmly rooted under Sec. 468, Sec. 472 and Sec. 481 of Chapter XII of the Bankruptcy Act. Under Sec. 468, "the creditors of each class, holding two-thirds in amount of the debts of such class" must accept the arrangement in writing before "an application for confirmation of an arrangement may be filed with the court". Sec. 472 authorizes the court "to confirm an arrangement if satisfied that--. . . (2) it is for the best interests of creditors and is feasible; . . . (4) the proposal and its acceptance are in good faith. . . ." Finally, Sec. 481 provides for the dismissal of the petition "if confirmation of the arrangement is refused".

Section 468:

In this case, the lower court found that the Appellants had not obtained the consent of any of the secured creditors listed in Schedule B of their petition (Finding No. 3, R. 313). There was no showing by the Appellants during the hearing that acceptance of their arrangement by at least two-thirds of the secured creditors would be possible, thereby putting Sec. 468 into operation to bind the Creditor-Appellees herein who are opposed to the arrangement. (R. 45-47).

On the contrary, it appeared that the debtors could not obtain the requisite acceptance by the secured creditors. First, the arrangement requires the secured creditors to subordinate their claim to a mortgage to Kula Development Corporation, whose officers and directors are essentially the same as the individuals listed as partners for the insolvent partnerships herein (Transcript, p. 17). Secondly, as will be shown, infra, Kula Development Corporation was probably insolvent at the time the arrangement was filed. Thirdly, no new creditors had committed themselves to finance the rehabilitation of Olinda Associates, Kula Garden Associates or Kula Development Corp., and no definite plan to obtain additional financing was set forth in the arrangement or at the hearing (Transcript, p. 21, pp. 34-37).

Where it appears certain that the debtor could not obtain the acceptance required by Sec. 468, a court may dismiss the arrangement without further delay. In Re Herweg, (C.C.A. 7, 1941), 119 F.2d 941, the appellate court affirmed the dismissal by the lower court of the debtor's Chapter XII petition upon the lower court's finding that the debtor had

> ". . . obtained the consents of none of her secured creditors to her proposal, and it appeared to the court from statements made during the course of the proceeding before him that the arrangement was not acceptable to the holders of the first mortgage bonds, and that the debtor would be unable to obtain any consents." Ibid., at 942. See also: In Re Potts (C.A. 6, 1944), 142 F.2d 883, 56 Am. Bankr. Rep. N.S. 175, cert. denied, 324 U.S. 868, 65 S.Ct. 910; Preas v. Kirkpatrick & Burks et al (C.C.A. 6, 1940), 115 F.2d 802, 44 Am. Bankr. Rep. N.S. 503; In Re Chalkley (E.D. Tenn., 1940), 84 F. Supp. 969.

Furthermore, Sec. 468(1) provides that "payment or protection" of creditors who do not accept the arrangement is required in accordance with Sec. 461(11). Pursuant to this requirement, the lower court found that no protection was afforded non-accepting secured creditors in Appellants' petition (Finding No. 4, R. 313), although Paragraph XVI of the arrangement (R. 19) proposes that the conveyance of such creditors' property to Kula Development Corp. shall be subject to the debts owing these creditors, provided that

these creditors "will compromise and settle on such terms as not to interfere with or negate the purpose and effect of this arrangement".

Paragraph XVI obviously attempts to comply with the first method specified under Sec. 461(11) as providing adequate protection to non-assenting creditors "by the transfer or sale, or by the retention by the debtor, of such property subject to such debts". However, this attempted compliance must fail on two grounds. First, the provision itself contains a condition which precludes any protection to opposing creditors unless they "compromise and settle" their debts on general, unspecified terms which would not "interfere with or negate the purpose and effect of this arrangement". In effect, this condition could alter the rights of the secured creditors even though the conveyance to Kula Development Corp. is subject to the secured debts. In this event, "the arrangement as such must fail if it provides for the first method of protection under Sec. 461(11) and it is not accepted by two-thirds in amount of the debts of any class." 9 Collier on Bankruptcy, 14th ed., Sec. 8.12, p. 1084. Since the Appellants were unable to show that the required two-thirds acceptance would be possible, the protection of Appellees under their arrangement was inadequate.

Secondly, the conveyance of opposing creditors' property to Kula Development Corp. would be a "speculative venture". (Finding No. 4, R. 313) The court found that Kula Development Corp. has no cash assets (Transcript, p. 24), it has a debt of $200,000 which has been outstanding since 1961 (Transcript, p. 26), it has not had any bookkeeping records since 1961 (Transcript, p. 27), and it has no source of income other than the development of certain lands in which it has some interest (Transcript, pp. 28-29), but whose state of development at the time of the hearing was apparently inadequate for the sale of such lands to obtain enough income to pay off its debt of $200,000. Furthermore, Appellant Ellis disclosed at the hearing that Kula Development Corp. was considering filing a Chapter X or XI petition with regard to its debts as they mature (Transcript, pp. 33-34). Finally, Appellant Ellis testified that the arrangement is designed to obtain new financing which would take care of existing obligations, provided the presently secured creditors would subordinate their claims to the new creditors (Transcript, p. 29). Yet, at the time of the hearing, Ellis could not cite a firm commitment from any one person who would invest in Olinda Associates, Kula Gardens Associates or Kula Development Corp. (Transcript, p. 21).

In Rader v. Boyd (C.C.A. 10, 1958), 252 F.2d 585, the debtor's proposed arrangement "provided for the retention of the bankrupt estate by the debtor, subject to the debts, and deferred any further payments to the creditors" for a few months, during which time the income from debtor's oil runs would be allowed to accumulate. 252 F.2d 585, at 587. The accumulated income would then be used to drill one, two or three wells, depending upon the success of the first and second wells. If all three wells were successful, the secured creditors would finally begin receiving payment on the debts. Ibid.

The Court of Appeals of the Tenth Circuit stated:

> "In short, the plan provided for a speculative venture with accrued funds belonging to the secured creditors.
>
> "We agree with the trial court that an arrangement which offers no more than a speculative venture with creditor's funds is not adequate protection for the secured creditors, and therefore not feasible within the contemplation of the Bankruptcy Act." Ibid.

The arrangement proposed by the Appellants is very similar to Appellant Rader's proposal, supra, in the method of obtaining income. Both arrangements are dependent upon the success of another venture, and this contingency determine whether or not the secured creditors receive any payments. However, the arrangement herein is less protective of the secured creditors than the Rader arrangement because Appellants

would force the secured creditors to subordinate their claims to those of the new creditors before new financing would be possible. Rader's arrangement merely asked for a deferment of payments to the secured creditors. Clearly, under Rader v. Boyd, the arrangement herein would be struck down as providing inadequate protection to secured creditors as required by Sec. 461(11), pursuant to Sec. 468(1).

Section 472:

In general, Sec. 472 does not apply to all real property arrangements. It is applicable to only those arrangements which "have been accepted by the requisite amount of claims as prescribed by Sec. 468 . . . ." 9 Collier on Bankruptcy, 14th ed., Sec. 9.07, p. 1134. Thus, assuming arguendo that Appellants herein could have obtained acceptance under Sec. 468, the petition would still be dismissed because the arrangement failed to meet the conditions to confirmation prescribed by Sec. 472.

Under Sec. 472, the district court has the authority to confirm or not to confirm the debtor's arrangement, depending on whether or not it is satisfied that the arrangement meets the specific conditions listed therein. Hence, if the court is not satisfied that the arrangement is "for the best interests of creditors" (Sec. 472 (2)), or that the "proposal and its

acceptance are in good faith" (Sec. 472(4)), it may refuse to confirm the arrangement. See: United Properties Inc. v. Emporium Dept. Stores, Inc. (C.C.A. 8, 1967) 379 F.2d 55; In Re Milwaukee Corp. (C.C.A. 7, 1938), 99 F.2d 686; In Re Hoxie et al (D.C. Me., 1910), 180 F. 508.

The broad discretion given the district court is exemplified in Gonzalez Hernandez v. Borgos (C.C.A. 1, 1965), 343 F.2d 802. In reference to Sec. 472, the First Circuit Court of Appeals stated:

> "The fact that two-thirds, or even all, of the creditors who have filed proofs of claim may have accepted a proposed arrangement under Chapter XII does not, ipso facto, require the confirmation of the arrangement. Chapter XII places the duty upon the district court to consider whether the arrangement complies with all the statutory requisites before it may be confirmed. Among these are that 'it is for the best interests of creditors' and is proposed 'in good faith.'" 343 F.2d 802, at 805.

In the Gonzalez Hernandez case, the appellate court affirmed the non-confirmation by the district court of debtor's real property arrangement even though "all creditors affected thereby had accepted the plan in writing, that the deposit required for priority claims, fees and costs had been made . . . ." Ibid., at 804. The court struck down the arrangement under Sec. 472 because the debtor attempted to use a Chapter XII proceeding to circumvent making support

payments to his dependent children. Ibid., 805-806. Classifying the dependent children as creditors, the court held that the arrangement was not in their best interest and was submitted in bad faith. Ibid.

The test to determine whether or not an arrangement is for the best interests of creditors is a comparative one. "Where the composition offer would pay creditors considerably less than they might reasonably expect to realize in liquidation, the composition. . . was not for the best interests of creditors." 9 Collier on Bankruptcy, 14th ed., 9.07(3), p. 1137.

In this case, Appellants filed for a real property arrangement after numerous foreclosure actions were instituted against them (R. 11-12). By taking this course, the Appellants were able to stay several foreclosure suits.

However, under Appellants' arrangement, the secured creditors are asked to surrender their preferred status to a corporation which may itself be insolvent already. Furthermore, as noted, supra, the corporation has no new sources of income to rejuvenate the corporation and to insure the success of the arrangement. Thus, the amount the secured creditors could expect to realize under the arrangement is completely unknown and may in fact be nothing as in Gonzalez Hernandez, supra.

Admittedly, a foreclosure action is not the same in procedure as a liquidation of assets by a bankrupt. However, in this case, the effect of both actions would be identical. The only assets of the partnerships herein appear to be the real property listed in their arrangement (R. 23). Foreclosure by the various secured creditors of the real property would in effect divest the Appellants of this property, the same result as under a liquidation of assets. Thus, under the foreclosure alternative, the secured creditors would at least realize the value of the property secured by them. Under the Appellants' composition, the secured creditors are given only a promise of payment, depending on new investments.

Before confirmation is possible, § 472(2) also requires that the arrangement be feasible.

> "The (feasibility) test is whether the things which are to be done after confirmation can be done as a practical matter under the facts. That necessarily depends on the varying facts of each particular case. It refers to the probability that the creditors will receive the amount of money provided for them pursuant to the arrangement, ... There should be considered the adequacy of the capital structure, the earning power of the property, economic conditions, the ability of the management, and any other related matters which determine the prospects of sufficiently successful operation to enable performance of the provisions of the arrangement." 9 Collier on Bankruptcy, 14th ed., 9.07(3), p. 1139. See Also Price v. Spokane Silver & Lead Co., (C.A. 8, 1938), 97 F2d 237, at 246.

A recent, pertinent case is United Properties Inc. v. Emporium Department Stores, Inc. (C.A. 8, 1967), 379 F2d 55, which decided, inter alia, the question whether or not debtor's arrangement had "a reasonable chance of success". Ibid., 65. Although the debtor had filed a Chapter XI petition, the feasibility of the arrangement was at issue under Sec. 366, the counterpart of §472 herein.

In United Properties Inc., the debtor's arrangement was found unfeasible because:

(1) The ratio of current assets to current liabilities was substantially less than two to one. Ibid., 66.

(2) The solvency of the Debtor is questionable. Ibid., 68.

(3) The evidence fails to establish that the Debtor could operate at a profit. Ibid.

(4) The cash flow was inadequate. Ibid., 69.

To reach these conclusions, the court reviewed the financial statements of the debtor. Also, it noted the lack of a comprehensive "projection of future earnings or cash flow", and an "independent appraisal of the inventory, the Accounts Receivable or other assets". Ibid., 65.

In this case, the arrangement can operate only if the secured creditors are willing to subordinate their claims to that of Kula Development Corporation (R. 15-18). Yet, as

already shown, supra, the financial status of the corporation is at best uncertain, and more likely, to be insolvent. No financial statements are available to determine its status and the existence of any current income.

Also, the possibility that the arrangement shall work successfully is dependent upon the sale of real property or the acquisition of new financing (Transcript, p. 28-29). Yet, as noted, supra, the development of the corporate real property for profitable sale appears negligible and no new investors have committed themselves to help in the financial recovery of the corporation.

Another factor which precludes the possibility of success of the arrangement is that the officers and directors of the corporation include the same individuals listed as partners in the Appellants, Olinda Associates and Kula Garden Associates (Transcript, p. 17). These individuals have managed to guide two partnerships into insolvency, and may have already done the same to the corporation. Yet, they want another opportunity to speculate with the secured creditors' property. Neither the court nor the creditors could be expected to place any confidence in the competency of these individuals, particularly where the arrangement would subordinate the secured creditors' preferred status to the corporation

managed by the financial wizards of the bankrupt partnerships.

The appellate court in United Properties Inc. was also faced with a "management that had led a successful corporation into financial difficulties" (C.A. 8, 1967), 379 F.2d 55, 70, but could not conclude that this factor would help prevent the success of the composition. It found the arrangement unfeasible only on the grounds noted, supra.

However, in the case at bar, essentially the same people have led not one, but two and possibly three, business enterprises into insolvency. Their management of the corporation would certainly be a factor in determining the feasibility of the arrangement herein.

Finally, the arrangement proposes that Appellant Ellis act as "arrangement manager" (R. 13). Yet, the lower court found that Appellant Ellis was too busy to file all the papers required for a Chapter XII petition, requesting three extensions of time for said filing (R. 24-29, R. 58-65, and R. 71-74); too busy to prepare for the February 17, 1967 hearing (Opening Brief, p. 9); and too busy for about a year to "follow through on 30 or 40 contacts" for the sale of property belonging to a Howard Whitney although the owner allegedly indicated that "if I (Ellis) could perform on that

particular property he'd be happy to come along with me on other ventures", such as investing in the partnerships herein and Kula Development Corporation (Transcript, p. 35). Mr. Ellis' past performance makes his ability to perform as arrangement manager very questionable.

On the above facts, the chance of success of the composition herein is certainly doubtful and the lower court correctly found it unfeasible.

Section 472(4) establishes the requirement that the arrangement be in good faith. However, the meaning of good faith is not defined. Hence, the "basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of Chapter XII in the proposal," and the court must examine the conditions existing when the petition was filed and the acts subsequent to filing. 9 Collier on Bankruptcy, 14th ed., 9.07(6) p. 1144-1145.

The one limitation on the definition of "good faith" appears to be the Supreme Court statement in John Hancock Mutual Life Insurance Co. v. Bartels, 308 U.S. 180, 60 S.Ct. 221 (1939), in which the Court excluded the "imputation of lack of good faith to a farmer-debtor" from Section 75 because of the "absence of a reasonable probability" of his

financial rehabilitation. Ibid., 184. Even assuming that the exclusion applies to Chapter XII petitions, Sec. 472(2) which requires the district court to be satisfied that the composition is "feasible" before it may be confirmed is unaffected. Section 75, which related to agricultural compositions, did not contain a provision comparable to Sec. 481 which authorizes dismissal of a Chapter XII petition where the arrangement does not receive confirmation.

Moreover, even the good faith definition of John Hancock would be applicable in the instant case. The Supreme Court stated that the good faith reference in Sec. 75(i) "hits at secret advantages to favored creditors or other improper or fraudulent conduct". Ibid., 185.

Of significance is the fact that Kula Development Corporation is a Class F creditor in Appellants' arrangement, four categories below the Creditor-Appellees herein (R. 22). However, the arrangement calls for the secured creditors in Class B to subordinate their claims to Kula Development Corporation. The critical question arises, Why propose such an arrangement?

As already noted, supra, Kula Development Corporation is probably insolvent; it has no current income; it had not published any financial statements for approximately six years

prior to the hearing in February 1967; it had not obtained any new creditors to rehabilitate the corporation, let alone the new venture proposed under the composition. Obviously, the reason for selecting Kula Development Corporation as the financial savior of the bankrupts herein was not based on financial considerations.

Rather, the reason appears to be the fact that the people involved in Kula Development Corporation are largely the same individuals as the partners herein (Transcript, p. 17). Appellants' arrangement would make Kula Development Corp. a secured creditor whose priority would jump from number six to number two, second only to the State of Hawaii. Hence, it directly favors a subordinate creditor which in turn favors the very same individuals involved in the partnership-debtors. It discriminates against the presently secured creditors, which is exactly the situation that the Supreme Court warned against in its definition of "good faith" in John Hancock, supra.

A pertinent case is Frakas v. Katz (C.A. 5, 1932), 54 F.2d 1061, in which the bankrupt transferred his assets to a corporation dominated by him. The court concluded that the transfer was fraudulent and voidable because

> ". . . the bankrupt reserved a substantial benefit to himself; the transfer resulting in his retaining complete control of the transferred assets and the beneficial ownership of a 98 per cent interest in them. A necessary effect of the transfer was to hinder or delay creditors by putting the transferred assets beyond the reach of legal process in their favor." Ibid., 1062.

The odor of bad faith is particularly heightened by the allegations of the general partners in their petition that they hold "equitable and/or legal title" to the real property listed in the arrangement "in trust" for the partnerships (R. 4). The record clearly shows that at least to the agreements of sale between the individual appellants and Appellees Fusao and Kimiyo Yumen, J-R-M Corporation and Myra Deane Charlton there is no reference to a trust arrangement or to the individuals as partners acting on behalf of Olinda Associates and Kula Garden Associates (R. 96-132, Transcript, p. 23-24, respectively). By such allegations, the individuals conspired to fraudulently place the real property owned by the abovementioned Appellees under a Chapter XII proceeding, thereby hindering any foreclosure actions available to said Appellees to regain possession of their property.

The record also reflects Appellants' fraudulent action against Adverse-Claimant Appellee (R. 245-255). The officers and directors of Kula Development Corporation, which

include the same individuals as the partners herein, used their position of trust and confidence to obtain a second mortgage from Farmland, Inc., on property which the corporation did not own (R. 247-249). Now, they are using the Bankruptcy Act to prevent Farmland, Inc. from perfecting their second mortgage (R. 249-251).

The conclusion following from the abovementioned facts is that the Appellants' arrangement is not in good faith as required by Sec. 472(4), and cannot be confirmed. Iden v. New York Life Insurance Co. (C.A. 4, 1939), 107 F.2d 695.

Section 481:

Where the creditors have not accepted the arrangement or where confirmation is refused, Sec. 481 authorized the district court to either adjudge the debtor a bankrupt or dismiss the Chapter XII proceeding, "whichever in the opinion of the court may be in the interest of the creditors". Thus, by its own terms, Sec. 481 becomes applicable where, inter alia, the debtor is unable to fulfill Sec. 468 (creditors' acceptance) or Sec. 472 (court confirmation). Also, Sec. 481 gives the court a choice between adjudging the debtor a bankrupt or dismissing the petition, depending upon which alternative serves the creditors' best interests.

The Seventh Circuit Court of Appeals interpreted Sec. 481 in Re Herweg (C.A. 7, 1941), 119 F.2d 941. As in the instant case, Debtor-Herweg had failed to fulfill Sec. 468 and Sec. 461(11). The Court of Appeals affirmed the lower court's dismissal of the petition stating, "Sec. 481 provides for procedure in case an arrangement is withdrawn or abandoned, or if no arrangement is accepted. Ibid., 943. See also In Re Potts (C.A. 6, 1944), 142 F.2d 883, 890-891; 56 Am. Bankr. Rep. N.S. 175, cert. denied, 324 U.S. 868, 65 S.Ct. 910; Preas v. Kirkpatrick & Burks et al (C.A. 6, 1940), 115 F.2d 802; 44 Am. Bankr. Rep. N.S. 503; In Re Chalkley (E.D. Tenn., 1940), 84 F.Supp. 969.

As to dismissal of the Chapter XII petition because the debtor could not obtain confirmation by the court, the case authorities cited in the discussion of Sec. 472, supra, is pertinent. Although those cases do not refer to Sec. 481 specifically, a logical reading of the cases clearly indicates that Sec. 481 is the basis of the district court authority to dismiss. See: 9 Collier on Bankruptcy, 14th ed., Sec. 10.01, p. 1194-1197.

D. Creditors Have The Right to Move For Dismissal of a Real Property Arrangement on Jurisdictional Grounds

The general rule is: Creditors may not oppose a voluntary petition in bankruptcy. See In re Ives (C.C.A. 6, 1902), 113 F 911. This rule seems applicable to a real property arrangement for there "is no provision in Chapter XII or applicable thereto which permits the filing of an answer to the debtor's petition for relief or which requires that the petition for relief be approved." 9 Collier on Bankruptcy, 14th ed., Sec. 4.11, p. 862. The appellants correctly note this rule and contend that Appellees Fusao and Kimiyo Yumen's motion to dismiss, in which the other Appellees herein later joined, was improper (Opening Brief, p. 24).

However, as in the case of most general rules, there is an exception to the above-mentioned rule. 9 Collier on Bankruptcy, 14th ed., Sec. 4.12, p. 863-864. The case of Chicago Bank of Commerce et al v. Carter (C.C.A. 8, 1932), 61 F.2d 986, specifically sets forth the exception:

> "At the threshold of this controversy, we are met with the objection that the appellants, being creditors, could not maintain petitions to vacate the adjudication in bankruptcy on a

> voluntary petition. As a general rule, a general creditor has no such standing in a bankruptcy court as to entitle him to move to vacate an adjudication made in a voluntary proceeding. In re A. C. Wagy & Co. (C.C.A.) 22 F.(2d) 9, 11; In re Ann Arbor Mach. Corp. 911. In the instant case, however, the motions challenged the jurisdiction of the court, and any interested party may raise the question of jurisdiction, or the court on its own volition may determine the question. We think it is fairly well established, both on authority and principle, that a creditor may attack even an adjudication in a voluntary proceeding on the ground of either jurisdiction or fraud upon the court. Zeitinger v. Hargadine-McKittrick Dry Goods Company (C.C.A.) 244 F.719; In re Garneau (C.C.A.) 127 F.677, 680; In re Guanacevi Tunnel Co. (C.C.A.) 201 F. 316, 319; In re Elmira Steel Co. (D.D.) 109 F. 456; Vassar Foundry Co. v. Whiting Corp. (C.C.A.) 2 F.(2d) 240. *Ibid*, 989.

This exception is clearly approved by the United States Supreme Court in *Securities and Exchange Commission v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 60 S. Ct. 1044 (1940). In fact, the Court appears to have extended the exception, supra, when it stated:

> ". . . it has long been the practice of bankruptcy courts to permit creditors or others not entitled to file pleadings or otherwise contest the allegations of a petition, to move for the vacation of an adjudication or the dismissal of a petition on grounds, *whether strictly jurisdictional or not*, that the proceeding ought not to be allowed to proceed." *Ibid*., 457-458. Emphasis added.

Of significance, also, is the fact that this case was decided on May 27, 1940, about two years after the amendment to §18(b). Appellants claim that this amendment deprived creditors of the right to contest an involuntary petition, and a fortiori, Appellees could not oppose a voluntary petition in bankruptcy (Opening Brief, p. 24). Undoubtedly, the Supreme Court was aware of the 1938 amendment when the above case was decided, but interpreted it as merely providing debtors in involuntary bankruptcy proceedings the same protection against creditors as voluntary bankrupts without abolishing the exception it espoused. Thus, Appellants' "a fortiori" argument is untenable.

In the case at bar, Appellee Yumen submitted a motion to dismiss the arrangement on four grounds (R. 96-132):

(1) The petition fails to state a claim upon which relief can be granted;

(2) Debtors' proposed real property arrangement is not proposed in good faith in that it provides no adequate means for execution of the arrangement;

(3) Debtors' petition and proposed arrangement is not to work a modification of terms of payment with creditors, but solely to give debtors time to refinance the whole debt and pay off present creditors;

(4) The movants, Fusao and Kimiyo Yumen, and their address are not included in Debtors' Appendix B to petition, List of Creditors, as more particularly required by the Bankruptcy Act.

Within the first objection, Appellee Yumen questioned the validity of the partnerships' right to a Chapter XII proceeding. Sec. 406 requires that a Chapter XII debtor be "the legal or equitable owner of real property of a chattel real which is security for any debt". However, Appellee Yumen noted that the substantive law of the State of Hawaii does not authorize partnerships to hold title, legal or equitable, to real property. Also, since the individual appellants may hold only equitable title to real property which was conveyed to them by agreement of sale--as in Appellee Yumen's case--they could not hold such title "in trust" for the partnerships. Finally, the agreement of sale executed by Appellee Yumen conveyed the property to the individuals alone, not to the partnerships or to the individuals as general partners. (See the discussion in R. 96-132).

Thus, in raising the issue regarding the validity of the Partnership-Appellants' ownership, legal or equitable, of the real property listed in their arrangement, Appellee

Yumen questioned the propriety of Appellants' Chapter XII proceeding. If the partnerships did not own any real property, then they could not seek relief under Chapter XII. See In Re Chalkley (E.D. Tenn., 1940), 84 F.Supp. 969.

In other words, Appellee Yumen's motion to dismiss on the ground that the partnerships did not own real property was essentially a challenge to the district court that it did not have jurisdiction over the Debtors and was without authority to stay under Sec. 414 the commencement or continuance of any suits against them. Appellee Yumen's challenge has its foundation in Re Tinkoff (C.C.A. 7, 1946), 156 F.2d 405, where the Seventh Circuit Court of Appeals concluded, inter alia, that:

> (1) Dismissal of the petition for real property arrangement for lack of jurisdiction was proper where the petitioner did not have any interest in real property;
>
> (2) Since the court lacked jurisdiction, "it had no authority to do anything other than order a proper distribution of the fund in the hands of its trustee." (Ibid., 407).

Even aside from the jurisdictional issue, supra, the Appellees' motion to dismiss must be allowed to stand

in this case where Appellants did not limit their appearance at the hearing to a special appearance on the question of whether or not creditors may file a motion to dismiss a petition for a real property arrangement before the creditors' meeting. By making a general appearance at the hearing, Appellants waived their right to object to Appellees' standing to bring the motion. Kuntz v. Young (C.A. 8, 1904), 131 F. 719; In re Elby (N.D. Iowa, E.D., 1907) 157 F. 935; In re Figenbaum (C.A. 2, 1903), 121 F. 69.

A waiver of their right to object is reasonable under the circumstances of this case. At the hearing, Appellants did attempt to substantiate the feasibility of their arrangement but failed. For this Court to accept Appellants' claim now that Appellees' motion was improper would force the lower court to "retry an issue already tried and determined between the same parties". In Re Figenbaum (C.A. 2, 1903), 121 F. 69, 70. See discussion at R. 278-284.

E. Appellants were Afforded Due Process of Law

The Federal Rules of Civil Procedure are made applicable to bankruptcy proceedings "in so far as they are not inconsistent with the Act" by Order 37 of the General Orders in Bankruptcy. Pertinent to the issue of due process in this case are Rule 5(a) which requires service of a motion "upon each of the parties" and Rule 6(d) which requires notice of a hearing to be served five days prior to the hearing date. Appellants contend that Appellees violated both rules, thereby denying them due process of law (Opening Brief, p. 29).

Appellants obtain the definition of due process (Ibid.) from the Illinois Supreme Court in Durkin v. Hey, N.E.2d 463, 466; 376 Ill. 292. The elements are (1) notice and (2) an opportunity to be heard and defend in an orderly proceeding. Although there is no such case in 22 N.E.2d 463, we may assume that the definition is proper because even under Appellants' definition of due process the facts of the case clearly show that all interested parties in this case were afforded their constitutional and legal rights.

Appellants allege that Appellees violated Rule 5(a) when Appellees failed to serve notice of the February 17

hearing to all of the creditors involved in the arrangement. They construe the term "parties" to include the debtor and all of its creditors (Opening Brief, p. 29).

Appellees do not agree with Appellants' interpretation as applied to the case at bar. A proper interpretation of Rule 5(a) as applied to proceedings in bankruptcy is the following:

> "Under Rule 5(a) as amended, 'all parties' are to be served. A possible interpretation of the amended rule would require service on all persons who have made an appearance in the over-all bankruptcy proceeding, or filed papers therein, including for example, all creditors filing claims. As Judge Clark noted in a related context, 'Clearly a bankruptcy court must have some leeway to take up matters involving certain claimants only without the necessity of opening the whole case at large before it'. (Elias v. Clarke (C.C.A.2d, 1944) 143 F2d 640, 644, 8FR Serv 42 b. 12, Case 1) This leeway would be provided by an alternative, and, it is believed, more desirable, interpretation of the application in bankruptcy of amended Rule 5(a). General Order 37 provides that 'in proceedings under the Act' the Rules shall be followed 'as nearly as may be,' and that the court may modify the rules for the preparation or hearing of 'any particular proceeding.' A reasonable construction of General Order 37 and Rule 5(a) would require service only upon parties to the 'particular proceeding' before the court. Such a construction would provide the flexibility necessary in bankruptcy proceedings, and would, at the same time, comport with the purpose of the 1963 amendment to Rule 5(a) of promoting full exchange of information among the parties to the action, since all the parties to the particular proceeding would be fully informed. To illustrate. In the

> ordinary reclamation proceeding the 'parties' for purposes of Rule 5(a) would be the reclamation petitioner and the trustee." 2 Moore's Federal Practice, 2d ed., Sec. 5.04(2), p. 1334-1335.

Under the facts of the instant case, Appellees have complied with both interpretations of Rule 5(a), supra. Since Appellees submitted their motion to dismiss before the other creditors filed their claims and before any other person had made any appearance in a bankruptcy proceeding (R. 92-95), the only persons involved in the proceeding and the only persons required to be served with the motion were the Appellants.

Also, under the more desirable interpretation, the only parties to be served with Appellees' motion to dismiss were the Appellants since no trustee had yet been selected. A particular proceeding involving the determination of the propriety and feasibility of Appellants' arrangement was to be held, and the district court had the discretionary authority under Rule 5(a) and General Order 37 to require service of the motion only upon the petitioner of the arrangement.

Furthermore, since this case involved a real property arrangement, service to all creditors would not be required. Sec. 472 unequivocably authorizes the district

court to refuse confirmation of an arrangement notwithstanding its acceptance by the requisite number of creditors. Gonzalez Hernandez v. Borgos (C.C.A. 1, 1965), 343 F.2d 802. Yet, the only purpose of the notice of the motion to the creditors would be to have them at the hearing to accept or refuse to accept the Appellants' arrangement. Because the only issue before the court was the arrangement itself--its feasibility and good faith, not the validity or invalidity of the creditors' claims (Transcript, p. 12-13)--and because under Sec. 472 the district court could overrule the creditors anyway, whether or not they were present at the hearing, service of the motion to dismiss to the other creditors in this case would have been superfluous.

As to Rule 6(d), the Appellants allege that the Appellees violated it when they failed to serve the motion and notice of hearing five days prior to the hearing date to the attorney for petitioners except William S. Ellis, Jr. (Opening Brief, p. 30).

Appellees' motion and notice of hearing were served on the attorney for petitioners except William S. Ellis, Jr. and on William S. Ellis, Jr., petitioner pro se, as listed on the Appellants' petition for a real property arrangement, on

February 9, 1967, eight days prior to the February 17 hearing (R. 92-95). Appellees had no notice of the substitution of counsel for petitioners except William S. Ellis, Jr., which occurred on January 26, 1967 (R. 56-57). Although Appellees are grateful to Appellant Ellis for sending the motion and notice of the hearing to the substituted counsel on February 13, Appellees must contend that (1) the loss of one day notice to the substituted counsel for petitioners except Mr. William S. Ellis, Jr. was not unduly prejudicial to the Appellants herein and (2) Appellants were afforded an opportunity to be heard and defend in an orderly proceeding.

The Fifth Circuit Court of Appeals in Herron v. Herron, (C.A. 5, 1958), 255 F.2d 589, stated:

> "Under Rule 6(d) appellant was entitled to five days notice of the hearing of a motion to dismiss. Rule 6(d) is not a hard and fast rule, however, and if it is shown that a party had actual notice and time to prepare to meet the questions raised by the motion of an adversary, Rule 6(d) should not be applied." Ibid., 593. See also Anderson v. Brady (E.D. Ky., 1945), 5 F.R.D. 85; Foley Lumber Industries, Inc. v. Buckeye Cellulose Corporation (C.C.A. 5, 1961), 286 F.2d 697.

The fact that certain district courts are permitted to revise the time for noticing motions adds weight to the position taken by the Fifth Circuit with regard to Rule 6(d),

supra. In fact, some "local rules have reduced the length of notice for certain motions, sometimes to less than 24 hours." 2 Moore's Federal Practice, 2d ed., Sec. 6.10, P. 1495.

In the instant case, the five-day notice period in Rule 6(d) should not be construed as being absolute, the violation of which would result in immediate, automatic dismissal of this case. Rather, the reasonable and proper construction of Rule 6(d) would be the Fifth Circuit view, to wit, whether or not Appellants had "actual notice and time to prepare to meet the questions" raised by Appellees' motion.

Although the petitioners represented by the substituted counsel did not obtain the full five-day notice period, co-petitioner William S. Ellis, Jr., appearing pro se, had about a week to prepare for the February 17 hearing. This fact is important because Appellant Ellis appeared to be the only one among the petitioners who had factual knowledge of the arrangement. At least, Appellant Ellis was the only petitioner who bothered to testify at the hearing to explain and support the arrangement (See Transcript). Yet, Ellis and the counsel for petitioners except William S. Ellis, Jr., who had been served with Appellees' memorandum of authorities

in support of their motion to dismiss, knew that the hearing would involve questions going to the propriety and feasibility of the arrangement. Since $717,000 worth of real property was at stake (R. 23), the lack of any testimony supporting the arrangement by any petitioner other than Ellis indicates that the other petitioners may not have had as comprehensive knowledge about the arrangement as Ellis.

The meager knowledge of the arrangement on the part of the other petitioners was further evidenced at the hearing (Transcript, p. 11-12):

> _The Court_: "Before I do anything else, Mr. Tamura, you said that you had not had as much time as you desired, and you joined Mr. Ellis in the motion for continuance. What have you to say on the matter of the motion to dismiss at this time?"
>
> _Mr. Tamura_: "On the matter of the motion to dismiss?"
>
> _The Court_: "Yes"
>
> _Mr. Tamura_: "On the points raised in the memorandum, your honor?"
>
> _The Court_: "Yes. The key point that you recognize is that the debtor posed real property arrangements not proposed in good faith in that the complaint provides

no adequate means of the execution of the arrangement."

Mr. Tamura: "I had a short conversation with Mr. Ellis prior to the hearing this afternoon and I asked him the specific question, How does he propose to effectuate the execution or that some way there is a dissolution of the property now that it is before the Bankruptcy Court? And he informed me--and I believed him--that in his proposed arrangement--" (Emphasis Added)

The Court: "Well, if you are going on his hearsay, let's get it out of Mr. Ellis himself."

Mr. Tamura: "That is the only thing I have."

Obviously, if the other petitioners had a firm knowledge of the arrangement, Counsel for petitioners except William S. Ellis, Jr. would have approached them, not Ellis. However, based on the foregoing statements, particularly the emphasized phrase, Ellis seems to be the mastermind of the arrangement.

Consider the following facts: (1) Ellis knew more about the arrangement than any other petitioner; (2) the February 17 hearing dealt solely with factual questions concerning the arrangement; and (3) Ellis had received more than a five-day notice prior to the hearing. Under these circumstances, Appellants were duly served with Appellees'

motion and notice of the hearing. The facts clearly show that even if counsel for petitioners except William S. Ellis, Jr. had had the full five-day notice instead of only four, the evidence presented at the hearing would not have varied significantly. Hence, under Herron v. Herron, supra, the Appellants herein had had actual notice and time to prepare to meet the questions raised by Appellees' motion.

Finally, Appellants were afforded the opportunity to be heard and defend in an orderly proceeding at the February 17 hearing (See Transcript). The court appeared very solicitous of the Appellants because instead of dealing with the technical substantive issue regarding the ownership of real property by partnerships, it went into the merits of the arrangement with which the Appellants should have been very familiar. Furthermore, all the court requested of the Appellants in order to grant their motion to continue the hearing on Appellees' motion to dismiss was prima facie evidence of the reasonableness of the arrangement and of the necessity of a continuance (Transcript, p. 12-13).

Pursuant to its request to Appellants, the court permitted Appellant Ellis to testify extensively. Throughout said testimony, the court was in control of the proceedings and kept the questions from the various counsel present at

the hearing as pertinent as possible. However, the court found that Appellants' arrangement was not even slightly meritorious and had to deny Appellants' motion to continue and to grant Appellees' motion to dismiss (Transcript, p. 50-52).

F. The District Court did not Abuse Its Discretion in Denying Continuance of the Hearing.

As already noted, supra, the decision of the court in denying Appellants' motion to continue the hearing was based on its finding that a continuance would be unnecessary because the arrangement itself was not in the creditors' best interests.

Appellant Ellis, the only petitioner to testify at the hearing and the mastermind of the arrangement, was given every opportunity to show that the arrangement was meritorious. He was not required to submit conclusive proof or even a preponderance of evidence at the hearing that the arrangement could be executed. All the court wanted was prima facie evidence (Transcript, p. 12-13), and the Appellants failed to meet this reasonable requirement.

Appellants claim that if the motion for a continuance was granted, the only prejudice to Appellees would be the loss of one of the counsel's time and plane fare from Maui to Honolulu (Opening Brief, p. 31). However, counsel for J-R-M Corporation and Myra Deane Charlton correctly showed that the injury to the Appellees would be substantially more serious. In the case of J-R-M Corporation and Myra Deane Charlton, Appellants had defaulted on a mortgage arrangement in 1961

and they had not paid "a dime" to the mortgagees since then (Transcript, p. 6). This substantial monetary injury is equally applicable to Appellees Fusao and Kimiyo Yumen because Appellant Ellis admitted that they had not been paid any more than J-R-M Corporation and Myra Dean Charlton (Transcript, p. 10). There has also been considerable monetary injury to all creditors whose pending suits (R. 11-12) were stayed by the petition for a real property arrangement. Further continuance of an unfair arrangement would serve to increase the monetary losses to Appellees herein and all other creditors.

Finally, Appellants assert that their affidavits at R. 144-150 clearly prove that they did not have enough time to prepare for the hearing (Opening Brief, p. 31). This issue was disposed of in the previous section on due process where it was shown that the only question that was discussed at the hearing was the feasibility of the arrangement. This is a factual question, not a legal one, which should have been uppermost in Appellants' mind when they drafted the arrangement and submitted it. Additional preparation would not seem necessary to meet the objections posed by Appellees.

On the other hand, if additional preparation was necessary, it would appear that the Appellants must have drafted

the arrangement in a hurry without considering whether or not it contained the means for its execution. It would also appear that Appellant Ellis had been negligent in not making time to prepare for the February 17 hearing on his arrangement since he had time to appear in another case in which he was only remotely connected one day before the hearing (Transcript, p. 13-15).

Under these circumstances, Appellants would have submitted the arrangement solely as a delaying tactic and not in good faith as required by Sec. 472(4). This situation would be reminiscent of In Re Tinkoff (C.A. 2, 1936), 85 F.2d 305, in which the Second Circuit Court of Appeals found the debtor's arrangement not to be in good faith because, inter alia, her arrangement was "begun and maintained to hinder and delay her creditors". Ibid., p. 309.

From the foregoing facts, the district court acted within the scope of its discretionary authority. Faced with substantial injury to the creditors on the one hand, and a real property arrangement without adequate means for its execution on the other, the court was obligated to deny Appellants' motion to continue and grant Appellees' motion to dismiss.

IV. CONCLUSION

Appellants herein did not file a petition to be adjudged a bankrupt within the terms of Chapter 1 to 7. Such action would result in the liquidation of their estate.

Rather, Appellants filed a petition for a real property arrangement as provided by Chapter XII of the Bankruptcy Act. In this way, Appellants could retain possession of the real property which were being taken away or under threat of being taken away by mortgagees and legal owners of the property.

However, Appellants' arrangement was found to be badly defective under the provisions of Chapter XII. It did not meet the requirements of Sec. 468 (acceptance by creditors), Sec. 461(11) (adequate protection of non-consenting creditors), and Sec. 472 (confirmation by the district court). Furthermore, there were issues relating to jurisdiction and fraud involved in the arrangement. These gross defects indicate that the arrangement had been hastily put together, possibly for the sole purpose of delaying Appellants' secured creditors from obtaining relief in the state courts.

The defects of the arrangement are determinations that have been shown to be adequately substantiated by the

facts of this case. As factual determinations, they should not be disturbed, "unless clearly wrong". Wayne United Gas Co. v. Owens-Illinois Glass Co. (C.A. 4, 1937), 91 F.2d 827, 831. See also the cases cited therein and those on pp. 3-4, supra, supporting this proposition.

The procedural objections made by Appellants must also be overruled because under the facts of the case they received adequate notice of the hearing and of the issues to be discussed at the hearing. They were given full opportunity to set forth the merits of their arrangement.

In the final analysis, this Court is faced with debtors who have attempted to use the Bankruptcy Act to benefit themselves at the expense of their creditors. They want to hold on to the real property, but do not want to provide any consideration to their creditors for this speculative venture. The equitable principles governing a bankruptcy court found that the arrangement was unmeritorious, and Appellees respectfully request that this Court affirm the decision of the lower court.

DATED: Wailuku, Maui, Hawaii, this 14th day of September, 1968.

UEOKA & VAIL, attorneys for Appellees
Fusao Yumen and Kimiyo Yumen; C. F.
DAMON, JR., attorney for Appellees
J-R-M Corporation and Myra Deane
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attorney for Molokai Properties, Inc.;
and SHIRO KASHIWA, attorney for
Appellee Farmland, Inc.

By B. Martin Luna
2121 Main Street
Wailuku, Maui, Hawaii

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was served this date upon counsel of record by mailing same, properly addressed and postage prepaid.

DATED: Wailuku, Maui, Hawaii, September 14, 1968.

B. Martin Luna

B. Martin Luna
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CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

B. Martin Luna

B. Martin Luna